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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 SECURITIES AND EXCHANGE COMMISSION,

4 Plaintiff,

5 v.

05 CV 5231(RJS)

6 AMERINDO INVESTMENT ADVISORS, INC.,
7 et al.,

8 Defendants.

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9 New York, N.Y.
May 4, 2012
10:05 a.m.

11 Before:

12 HON. RICHARD J. SULLIVAN

13 District Judge

14 APPEARANCES

15 SECURITIES AND EXCHANGE COMMISSION
Attorneys for Plaintiff

16 BY: MARK D. SALZBERG
NEAL R. JACOBSON

17 ROBINSON BROG LEINWAND GREENE GENOVESE & GLUCK PC
Attorneys for Defendant Alberto William Vilar
18 BY: DAVID CLIFFORD BURGER

19 VIVIAN SHEVITZ
Attorney for Defendant Gary Alan Tanaka

20 STILLMAN & FRIEDMAN, P.C.
Attorney for Claimants Paul Marcus, Ronald Salvittii
21 BY: JULIAN W. FRIEDMAN

22 BEGOS HORGAN & BROWN LLP
Attorneys for Claimants Lisa Mayer, Debra Mayer
23 BY: PATRICK W. BEGOS

24 BIRD BIRD & HESTRES, P.S.C.
Attorneys for Claimant Heitkonig
25 BY: EUGENE F. HESTRES

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(Case called)

THE DEPUTY CLERK: 05 Civil 5231, Securities and Exchange Commission v. Amerindo Investment Advisors, Incorporated.

For the plaintiff.

MR. JACOBSON: Your Honor, Neal Jacobson on behalf of the Securities and Exchange Commission, and with me is my colleague Mark Salzberg.

THE COURT: Mr. Jacobson, Mr. Salzberg, good morning. For the defendants.

Amerindo Investment Advisors, Inc. is not represented, correct?

MS. SHEVITZ: Correct.

THE COURT: For Mr. Vilar.

MR. BURGER: David Burger, your Honor.

THE COURT: Mr. Burger, good morning to you. For Mr. Tanaka.

MS. SHEVITZ: Vivian Shevitz for Mr. Gary Tanaka.

THE COURT: Ms. Shevitz, good morning to you.

MS. SHEVITZ: Good morning.

THE COURT: We have a number of corporate defendants. None of them are represented at this point, certainly not by either of you?

MS. SHEVITZ: Correct.

THE COURT: We have also present, if you could state

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1 your names for record.

2 MR. FRIEDMAN: Julian Friedman, representing Paul
3 Marcus and Ronald Salvitti who are claimants, ATGF claimants.

4 THE COURT: Good morning to you.

5 MR. FRIEDMAN: Good morning.

6 MR. BEGOS: Good morning, your Honor.

7 Patrick Begos, representing Lisa and Debra Mayer, who
8 are also plaintiffs in bankruptcy.

9 THE COURT: We all know each other and that is really
10 just for the record.

11 This case is now all mine. Judge Swain has passed it
12 over to me because I had the criminal case.

13 We are here really extensively in connection with two
14 and a half motions that are being contemplated. I say two and
15 a half because the SEC is contemplating a motion for summary
16 judgment and, also, maybe, kind of, at some point, a motion to
17 amend.

18 Do I have that right, Mr. Jacobson?

19 MR. JACOBSON: Essentially correct. I can --

20 THE COURT: You will elaborate in a minute.

21 And the defendants are each contemplating motions to
22 dismiss this complaint.

23 It seems to me it probably makes the most sense to
24 have you amend the complaint first and then we have cross
25 motions, the motion for summary judgment and the motion to

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1 dismiss at the same time.

2 Let me just ask you quickly, do you agree or disagree
3 with that, Mr. Jacobson?

4 MR. JACOBSON: I don't disagree with the concept,
5 although I am not sure that is the best way to go in the
6 particular instance.

7 THE COURT: I will come back to you and you can
8 explain to me why it is not the best way to go or what is the
9 best way to go.

10 Ms. Shevitz, Mr. Burger, what are your thoughts on
11 that, what I just proposed? Do you think that is the most
12 efficient way to go or not the most efficient way to go?

13 MS. SHEVITZ: I would kind of like to know what the
14 alternatives are.

15 THE COURT: The way I see it is sort of the
16 alternative is what Mr. Jacobson had proposed in his letter
17 which is that we do summary judgment first and then, depending
18 on how that shakes out, then they get to amend and then at that
19 point do a motion to dismiss on the amended complaint, unless
20 the defendants are doing two motions to dismiss complaints, the
21 original and then later the amended.

22 MS. SHEVITZ: No. I certainly prefer less work.

23 THE COURT: That's what I figured.

24 And you agree?

25 MR. BURGER: I agree, your Honor.

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1 THE COURT: Tell me, Mr. Jacobson, why that's not the
2 way to go? I read your letter, but tell me again.

3 MR. JACOBSON: Your Honor, the first part of the SEC's
4 amended complaint alleges essentially the exact same facts that
5 were decided in the criminal trial with respect to Lily Cates
6 and her investments in the SBIC and the advisor fraud that was
7 committed against her.

8 THE COURT: That's clear we have the investment
9 advisor fraud, and that is not affected by Morrison at all,
10 correct?

11 MR. JACOBSON: Correct.

12 THE COURT: You agree with that or no, that the
13 investment advisor fraud that is alleged as counts of this
14 complaint and was a count of conviction in the criminal case
15 are not affected by Morrison?

16 MS. SHEVITZ: No. I believe that they are affected by
17 Morrison. I believe Morrison affects everything.

18 THE COURT: Let me hear what you have to say. And I
19 think it probably makes more sense to have you respond in toto,
20 Ms. Shevitz, rather than asking you to keep jumping up and
21 responding piecemeal.

22 MR. JACOBSON: Then with respect to certain GFRDA
23 investors, the fraud against whom was proven in a criminal
24 trial, specifically, Ms. Tara Colburn and Robert Cox, Graciela
25 Lecube-Chavez and the Mayers, they were all proven at the

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1 criminal trial. Again, the first part of our complaint alleges
2 the fraud with respect to GFRDA, including those victims -- the
3 complaint alleged specific victims but not an exclusive list of
4 victims, so we contemplated there may be other victims, other
5 than those referenced in the complaint --

6 MS. SHEVITZ: I can't hear you. I'm sorry.

7 THE COURT: This is such a big courtroom and the mikes
8 are not -- mine is so hot but yours are really not great. Just
9 speak nice and loud.

10 MS. SHEVITZ: Stand at the lectern, so it is coming
11 from this way.

12 MR. JACOBSON: Is this better?

13 THE COURT: Much better.

14 MR. JACOBSON: We believe that the fraud with respect
15 to the victims that we identified in our letter has already
16 been proven at the criminal trial.

17 The only issue for collateral estoppel that might have
18 not been proven at the trial is whether or not the underlying
19 securities transactions for which the defendants were convicted
20 occurred in the United States. And that is the Morrison issue
21 that Ms. Shevitz has raised.

22 We believe, however, that a clear reading of the
23 record shows that there is actually no dispute whatsoever of
24 material fact with respect -- that the investors in fact were
25 in the United States when they committed the securities

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1 purchases. And we think that the record is very clear on that
2 point.

3 So we believe that we could do -- we believe the most
4 efficient thing to do would be to file a motion for summary
5 judgment based on collateral estoppel with respect to liability
6 and then supplement the Morrison argument by references to the
7 record that clearly show that the transactions occurred in the
8 United States.

9 And then if there is some evidence that Ms. Shevitz
10 believes contradicts that and raises a genuine issue of
11 material fact, the Court can look at it and determine whether
12 in fact there really is any genuine issue of material fact. We
13 don't believe there is any.

14 THE COURT: I know what you think, and I think there
15 are some strong arguments -- some stronger for some causes of
16 actions than others -- but I am still not sure why it is not
17 more efficient just to have you amend the complaint in light of
18 the fact that five years have gone by or more -- more -- and
19 then we are just shooting at one charging instrument and I can
20 have motions going both ways, summary judgment and the motion
21 to dismiss.

22 MR. JACOBSON: When we would file summary judgment
23 motion, then it would still be the same summary judgment
24 motion, it would not include the entire complaint.

25 THE COURT: I don't know whether that is true or not.

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1 If you amend it -- I don't know what your amendments exactly
2 are going to look like. You have not attached an amended
3 complaint.

4 MR. JACOBSON: The amendment would allege additional
5 facts with respect to the ATGF fraud, the advisor fraud on the
6 ATGF fund, however, there has been no discovery in this case.

7 THE COURT: What you are saying, there is nothing from
8 the trial record that would support those claims?

9 MR. JACOBSON: Correct. So those claims would have to
10 be subject -- we have evidence that we could probably produce
11 somehow and maybe create a summary judgment record, but as a
12 practical matter, there has been no discovery on those issues
13 so I am not sure that would be a legitimate way to go.

14 THE COURT: Let me ask you this. This is just a
15 hypothetical. Assume we do it the way you have asked and
16 assume then that I grant summary judgment on the investment
17 advisor fraud and the other cause of action that turn on the
18 evidence introduced at trial. We still would then need to go
19 forward with respect to damages and loss or no? You are saying
20 that that is all developed by the trial record?

21 MR. JACOBSON: We believe that is developed by the
22 trial record.

23 THE COURT: So if you got summary judgment on those,
24 that portion of the complaint, you are saying then you wouldn't
25 even proceed on the rest of the complaint?

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1 MR. JACOBSON: I think that would depend on what
2 happens after summary judgment is either granted or denied. If
3 it is denied, clearly, we would proceed to litigation on all
4 the counts of the complaint. If the Court grants summary
5 judgment and then grants equitable relief in the form of
6 disgorgement and award of penalties, we may be in a situation
7 where, as a practical matter, it is not going to be in the
8 commission's interest to continue to litigate the matter just
9 for the purpose of proving an additional fraud after we have
10 already proven securities fraud and advisor fraud because,
11 assuming we got the relief we would want, we would have
12 injunctions, disgorgement and penalties with respect to that
13 fraud. And if the moneys that are now subject to substitute
14 assets orders and the other in the criminal case were to be
15 distributed back to investors, the commission would not have an
16 interest in pursuing the other claims.

17 So that's where we are. We are not sure if proof of
18 the other claims is going to be necessary at the end of the day
19 if your Honor grants summary judgment.

20 THE COURT: That may be true. Assuming that is true,
21 but asking you to amend now wouldn't make you prove anything,
22 it would just make you amend which wouldn't be, I imagine, that
23 onerous a task.

24 MR. JACOBSON: No. As Ms. Shevitz said, that is a
25 much easier task than filing a summary judgment, an amended

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1 complaint that we file --

2 THE COURT: Sorry to interrupt you, but what you would
3 be talking about then is amending and then moving for a partial
4 summary judgment on the amended complaint and then the
5 defendants moving at the same time, I gather, for a motion to
6 dismiss the amended complaint, right?

7 That's a question to defendants.

8 MS. SHEVITZ: If I understand what you are saying, you
9 are saying that we would move to dismiss the amended complaint?

10 THE COURT: Right.

11 MS. SHEVITZ: Correct.

12 THE COURT: I would have it all happening at the same
13 time.

14 MS. SHEVITZ: I would much rather have it all
15 happening at the same time.

16 THE COURT: I am inclined to agree. I think it is a
17 more efficient use of my time, and I think it is probably a
18 more efficient use of your time. Certainly the defendants
19 would view that as more efficient. And I think there is going
20 to be a fair amount of overlap in some ways as to the motions,
21 the opposition for summary judgment and the moving papers on
22 the motion to dismiss, right?

23 MS. SHEVITZ: Yes.

24 THE COURT: There will be a lot of the same legal
25 issues, a lot of the same factual issues.

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1 MS. SHEVITZ: I would like to say, I know that there
2 are two cases, but I would like to put the SEC lawyers on
3 notice that in the supplemental appendix of the reply brief
4 filed for defendant Vilar on Monday, there are numerous
5 documents and discussion of documents that we discovered in the
6 documents now in the record by way of disks containing TIF
7 documents, but they absolutely belie any claim that this were
8 anything but offshore transactions by anything.

9 I would say, before you file a new document, that
10 somebody should take the initiative and look at those because
11 we just were forced to. And what is in there is absolutely
12 amazing.

13 MR. JACOBSON: For what it is worth, your Honor, I
14 have reviewed the supplement that Ms. Shevitz filed and I
15 disagree with her characterization.

16 THE COURT: You are not as amazed?

17 MR. JACOBSON: I am not quite amazed.

18 THE COURT: Well, I don't need to pass on the
19 amazement factor.

20 How long would it take you to amend your complaint? I
21 assume that you have a pretty good idea of where you would want
22 to go with it.

23 MR. JACOBSON: Three to four weeks.

24 THE COURT: And then how long to file your motion for
25 summary judgment?

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1 MR. JACOBSON: Three weeks after that -- unless we are
2 going to have enough time to review the amended complaint.

3 THE COURT: Well, they are going to have time to
4 review the amended complaint, but I am just trying to figure
5 out how long it is going to take you to pull the trigger on
6 each of these events. You are saying three weeks, maybe
7 four --

8 MR. JACOBSON: Maybe four for each.

9 MS. SHEVITZ: I have no problem with the time. I have
10 to say that anything I review now, I have to review with my
11 client who is incarcerated in California. And right now my
12 communication with him is in 15-minute chunks before they cut
13 off the phone, if he has that time to call me. So unless we
14 have something that remedies that, I am going to need time to
15 review everything with him.

16 THE COURT: I assume that you will also want to take a
17 look at what the amended complaint looks like before you can
18 give me a full estimate.

19 MS. SHEVITZ: I do. And I will want to amend my
20 motion to dismiss to add some other grounds that we just
21 discovered last week.

22 THE COURT: I don't think I want to do another round
23 of premotion letters. I think, clearly, we are going to have
24 the motions.

25 What I am going to do is this. I am going to give the

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1 SEC three weeks to amend. So three weeks from today is May
2 25th. May 25th, the amended complaint will be filed.

3 Then what I would like is, if I give defendants two
4 weeks, do you think two weeks is enough time to review the
5 complaint before I start the clock running on the motions --
6 what were you going to say?

7 MS. SHEVITZ: Two weeks is a very short turnaround
8 time to talk to everybody.

9 THE COURT: Let me finish.

10 What I was going to say, two weeks, I was going to ask
11 the parties to send me a joint letter with what you propose as
12 a briefing schedule.

13 That way, two weeks until the pleading, and then you
14 talk to the SEC and say, OK, let's do our cross briefs, our
15 opening briefs on X date, responses on Y, reply on Z. If you
16 all agree on that, I am likely to defer to you in terms of
17 timing. But what I want is really cross motions, summary
18 judgment and motions to dismiss at the same time on a schedule
19 that is, reasonably, basically 30 days apart. 30 days after
20 the motion, then the response and then probably two weeks after
21 that to reply, OK?

22 MS. SHEVITZ: If this is in the summer, can we have a
23 little time off there?

24 THE COURT: You can build that in it.

25 So May 25th I am going to have the amended complaint

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1 filed.

2 And two weeks after that, June 8th, the parties are
3 going to send me a proposed briefing schedule.

4 If you think you need more space than the normal 25,
5 you can articulate that in that letter.

6 MS. SHEVITZ: Normal --

7 THE COURT: In the joint letters that you are going to
8 send me, if you think you are going to need more than 25 pages,
9 you can take that up in the letter.

10 Propose a briefing schedule in that letter. I will
11 look at it. I will likely defer to you on it. If I disagree,
12 I will let you know. And then I will set a date also for oral
13 argument. So we will have our schedule on the motions at that
14 point. OK?

15 MR. JACOBSON: Yes, your Honor.

16 THE COURT: Anything anybody else want to say on the
17 motions?

18 MS. SHEVITZ: No.

19 THE COURT: So I think the goal is to get that going,
20 and until that is going, I just think that we are going to be
21 in limbo even longer.

22 Folks at this end of the table are obviously
23 interested in trying to revive the settlement discussions that
24 Judge Swain in particular but I with her was very anxious in
25 getting going with respect to the investor money. I am still

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1 hopeful that that can happen, but I can tell you, candidly, I
2 cannot make that happen unless the parties here and the
3 government in the criminal case agree that that should happen.
4 There has to be some consensus among the different players
5 before that can happen. Otherwise, until I rule on the
6 motions, and maybe the way I will rule on them will make it
7 easier for them to get a special master or magistrate in to fix
8 this, but until I rule on the motions, there is not much I can
9 do unless you folks consent.

10 MS. SHEVITZ: We are still very interested in getting
11 things moving.

12 With all due respect, it seems to me that at least the
13 claims process that everybody seemed to think had to be done --
14 I mean the government had wanted it done through the DOJ,
15 through the commission. But some way or other, they have to
16 have a document saying, here is our claim, here is our
17 whatever. We had suggested, Mr. Friedman and I both, using a
18 magistrate for that.

19 THE COURT: The magistrate judge in this case is
20 Magistrate Judge Fox, and I don't mind referring anything to
21 him, but I don't want him to get sort of stuck in a mire of
22 nobody agreeing on anything.

23 MS. SHEVITZ: No, I think -- and tell me if you think
24 it is a good idea -- that if we start that process and say OK,
25 these investors should present their documents. Let's see what

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1 the claims are, in their view, and that's it for now anyway at
2 this stage. And we can look and see what their claim are and
3 move forward.

4 THE COURT: Mr. Begos.

5 MR. BEGOS: Your Honor, I think that is putting the
6 cart before the horse. It would be a simple matter for the
7 defendants, Vilar and Tanaka, to agree to a distribution and
8 then claims can be determined.

9 From my clients' standing and point of view, they have
10 judgments in the state court action for 20-something million
11 dollars against Vilar, Tanaka and Amerindo. So the claim
12 process for the Mayers is very easy. They have already proved
13 their claims and there is also a restitution order by your
14 Honor.

15 I don't see why it is necessary for the victims and
16 investors to establish what they are owed before the defendants
17 agree that there should be a distribution to those victims. It
18 seems like the plan is to see if perhaps there might be some
19 money left over for the defendants before they agree to a
20 distribution for the victims. And I think that is unwarranted
21 and inappropriate. I understand your Honor cannot do
22 anything --

23 THE COURT: I can't. Yes. Look, if the government
24 wanted to do some things, they could. If all of you could
25 agree on some things, than that would make certain things

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1 possible that right now I cannot compel you to do. So I
2 understand your point of view. I guess your real issue is what
3 is the benefit of sending this to a magistrate judge if all he
4 is going to hear is pretty much what Judge Swain and I already
5 heard.

6 MR. FRIEDMAN: Your Honor, may I address that?

7 THE COURT: You may, Mr. Friedman.

8 MR. FRIEDMAN: I am sad that your Honor feels there is
9 nothing you could do.

10 THE COURT: Do you disagree with that?

11 MR. FRIEDMAN: I think that action needs to be taken
12 to avoid a possible jeopardy of some of the assets, and let me
13 tell you what I mean by that.

14 Within the last 10 days approximately, JP Morgan
15 Chase, in response to a subpoena issued by Ms. Shevitz has now
16 produced at least current and recent account statements for
17 eight different Amerindo related accounts. Three of those
18 eight accounts are marked by the bank -- and I don't know
19 exactly what this means -- but are marked by the bank on the
20 account statements themselves as abandoned property. That's my
21 concern. My concern is that, while we are all having
22 conferences and talking about possibilities, assets may be
23 being dissipated by operation of law or by some other way.

24 The second related point is that the JP Morgan
25 statement for what I call the big ATGF account, an account with

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1 a stated value as of March 1, 2012 of \$25 million and, in
2 addition, approximately 75 to 100 unpriced securities so that
3 the real value, I think, is substantially in excess of 25
4 million -- there are unpriced securities listed on that
5 statement, and this is something I always suspected but now I
6 see because I have finally seen the statement.

7 David Ross, your Honor may remember --

8 THE COURT: Yes.

9 MR. FRIEDMAN: -- is basically working, consulting
10 with us.

11 There are several unpriced securities listed in the
12 statement which, according to Mr. Ross, have been the subject
13 of mergers and acquisition. Among the acquiring companies are
14 Amgen and IBM and Intel and Microsoft, so we are talking about
15 very significant assets.

16 And my concern, and I don't know because we have not
17 done any of this yet, is that there may have been tender
18 offers. The time to respond to those tender offers may have
19 expired, may be expiring and somebody has to take action to
20 protect these assets.

21 THE COURT: I think that is a great point. Those are
22 very interesting facts. I guess the next thing to consider
23 then is what are you asking me to do and what is the authority
24 I have to do it?

25 MR. FRIEDMAN: I think that I am asking you to refer

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1 the matter to a magistrate.

2 THE COURT: Well, that is easy but what are you asking
3 the magistrate judge to do and what is his authority?

4 MR. FRIEDMAN: I can tell you what I would be asking
5 him to do. I cannot yet tell you what his authority would be
6 because I need to do some more looking, but I believe that at
7 the very least, the magistrate judge would have the ability to
8 issue an order either notifying or authorizing the parties, the
9 claimants to notify all the entities, including JP Morgan
10 Chase, that no property is being abandoned, no rights are being
11 forfeited, no rights are being waived.

12 THE COURT: There is nothing that the magistrate can
13 do that I can't do -- in fact, there are some things that I can
14 do that he can't do.

15 So what are you asking the Court to do, I think is
16 really the issue and what is the authority that the Court would
17 have?

18 So if you are asking for a receiver or are you asking
19 for a special master?

20 Are you asking for some other intervenor who is going
21 to take charge of this thing, then I think that is worth
22 considering, but who is going to pay for it and out of what
23 funds?

24 MR. FRIEDMAN: Let me just think about those questions
25 and try to respond in order.

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1 First of all, I am asking your Honor or a magistrate
2 judge --

3 THE COURT: Right.

4 MR. FRIEDMAN: -- to issue an order -- and I think
5 that you have the inherent power to do it in preservation of
6 the assets -- notifying various interested third parties such
7 as banks, portfolio companies and acquirers of portfolio
8 companies that there are judicial proceedings and that until
9 those judicial proceedings are resolved, no rights are being
10 forfeited.

11 In essence, as I listen to myself, I guess it is
12 asking for injunctive relief just directing -- I guess it would
13 have to be the third parties on whom service is made just to
14 freeze everything. It is a freeze order of a kind. I don't
15 know the right terminology because I have not looked at it from
16 this point of view but in essence that's what it would do.

17 Secondly, I would endorse Ms. Shevitz's claim that
18 there be a reference to the magistrate judge for the purpose of
19 considering claims because, ultimately, those claims are going
20 to have to be considered.

21 And even if your Honor were to say, as you did, that
22 even at the end of the claim process you don't have the right
23 and the magistrate judge would not have the right to order a
24 distribution, at least we would have gone through the claim
25 process so that, in the event there comes a day when the Court

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1 does have the authority to order the distribution, we would not
2 first have to begin a process. We would be using the time to
3 make the claims process.

4 And I think the claims process is valuable for another
5 reason. There are certain claims that I anticipate that my
6 clients will object to. Just as the other parties would have
7 the right to object to my parties' claims. That, by
8 definition, would be an adversary situation and would take some
9 time to litigate. So, again, that can be done now rather than
10 waiting until the end of the process.

11 THE COURT: I think these are all good points, some of
12 which I have heard before, of course. But the claims process
13 would look like what? You would be ordering who to notify
14 whom?

15 MR. FRIEDMAN: Well, there are certain names that are
16 already in the record, claimants' names by virtue of letters
17 that the government has written to the Court, so there is a set
18 of claimants.

19 I guess then, ultimately, there would have to be
20 notice by publication as to anybody else.

21 THE COURT: So who is making that notice and who is
22 paying for that publication, Magistrate Judge Fox out of his
23 own pocket, the Court, you, Ms. Shevitz, the government, the
24 SEC?

25 I don't mean to be difficult. I don't mean to throw

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1 up roadblocks, but these are, obviously, the things that should
2 be thought about. And it is not fair to ask you to give me an
3 answer today, but I want you to think about that and then you
4 can make a proposal with respect to the injunctive relief which
5 you are seeking. I think you can think about what that should
6 look like and also the authority for it.

7 I am not against doing this on two tracks. I think we
8 have to get the substantive motions going because we may not be
9 anyplace close to resolving the rest of this in six months'
10 time and we have to resolve substantive issues. But I don't
11 mind pursuing two tracks and one that is allowing the investors
12 to get their ducks in a row for when the substantive issues are
13 resolved. I am fine with that, but I need details as to what
14 the heck this thing is going to look like, who is going to pay
15 for the costs involved, who is going to be responsible for
16 identifying the claims -- all of that stuff.

17 MR. FRIEDMAN: Could I have a relatively brief period
18 of time to make a proposal?

19 THE COURT: Sure. I am not really in a position to
20 order you to do something by a particular time, but if you want
21 to get me something in a couple of weeks, that is fine.

22 MR. FRIEDMAN: Should I do that by letter?

23 THE COURT: You should do that by letter and CC --

24 MR. FRIEDMAN: -- a couple of weeks with copies to
25 everybody?

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1 THE COURT: CC everybody, yes.

2 MS. SHEVITZ: I want to say that my client, Gary
3 Tanaka -- both clients -- they are both very interested in
4 finishing this with the investors that they know that they owe
5 money to by contract. We want their claims --

6 THE COURT: I have heard that at sentencing and I have
7 heard that a number of times since, but whenever it sounds like
8 it is anybody who testified against them at a trial, it sounds
9 like the tone changes --

10 MS. SHEVITZ: No, Judge. The problem is that the SEC
11 has taken the position that we can't distribute unless we agree
12 to the forfeiture. The forfeiture includes Amerindo U.S.,
13 Amerindo this, Amerindo that -- every single thing on the
14 substitute asset sheet. I am not agreeing to that.

15 THE COURT: I am not sure that that is an accurate
16 statement of the SEC's positions.

17 MS. SHEVITZ: I think it is and it has been, and it is
18 in letters that we have sent and in the documents. That is not
19 acceptable. We are never going to do that. We are never going
20 to do that. To that extent, then they know. But we do want to
21 agree to numbers which can be done. As long as the SEC says no
22 distribution in our case unless you agree to give up everything
23 on the substitute asset forfeiture list, no. That is not
24 happening. So that is the sticking point, your Honor.

25 THE COURT: Mr. Jacobson.

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1 MR. JACOBSON: For what it is worth, originally when
2 this whole thing came about after the criminal convictions
3 occurred, we approached Ms. Shevitz to try to talk about a
4 settlement of the case that would involve our staff's
5 proposition to get injunctions.

6 MS. SHEVITZ: I can't hear you.

7 THE COURT: Yes, use the other mic.

8 We have to get these mics fixed in here.

9 MR. JACOBSON: Your Honor, we had approached -- and
10 Ms. Shevitz, I guess, put my emails and all kinds of things
11 before your Honor and Judge Swain -- the defendants with a
12 proposition to recommend a settlement whereby their clients
13 would agree to injunctions under the Securities Exchange
14 Investment Advisors Act, and they would agree to let the funds
15 that belong to investors -- and we believe pretty much most of
16 the funds that are in the accounts are investor funds. There
17 is an issue perhaps with respect to the pension fund, which I
18 don't know if anybody knows very much about, exactly how that
19 was funded. At least with respect to the Amerindo corporate
20 accounts, hat they would have to release their claims to those
21 accounts because we didn't see any circumstance under which
22 they were entitled to any of the money. And given the severe
23 punishment in the criminal case and the forfeiture orders and
24 restitution, we could possibly be in a position to recommend to
25 the commission not to seek any additional monetary relief

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1 against defendants under those circumstances. So that is
2 probably what --

3 THE COURT: Here is the deal. If it turns out that
4 there is \$60 million or \$70 million worth of assets there, then
5 it seems to me that you and Ms. Shevitz and everybody
6 representing the individuals in the criminal and civil cases
7 you can preserve your fight over what is left, but if there is
8 agreement that the investors are entitled to at least this
9 much, I don't see why that is something that couldn't be
10 resolved before the criminal and civil cases work their way
11 through the Supreme Court.

12 MR. JACOBSON: We completely agree. We have no
13 problem with money being released to investors.

14 THE COURT: The first step then is figuring out what
15 is the asset value and what the different claimants are
16 asserting they are entitled to. So we think that we do have to
17 do that. And I don't think that a condition or a precondition
18 of doing that is the defendants sort of consenting to the
19 forfeiture. That is just not going to happen.

20 MR. JACOBSON: That's not what we said. That was part
21 of the settlement where we end the case.

22 MS. SHEVITZ: My understanding --

23 THE COURT: Go ahead.

24 MR. JACOBSON: We don't object to the funds being
25 released to pay the investors at any point without a

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1 settlement. My understanding, however, is that they want a
2 release from any further liability --

3 THE COURT: I think everybody, in fairness, was
4 offering suggestions or structures that would work and some of
5 them, obviously, were objectionable in some part or other to
6 the others and we didn't get very far. So I do think it is
7 probably worth taking a fresh look, but not at the expense of
8 the substantive motions because we are not waiting for that.

9 MR. JACOBSON: We agree.

10 THE COURT: I think that the government, the United
11 States Government in a criminal case is going to have to get
12 involved at some point. But I do think Mr. Friedman is on
13 something when he says, let's just focus right now on getting
14 ducks in a row, and once ducks are lined up, my hunch is that
15 people are going to be much more willing and able to work out a
16 compromise because they know the issues there.

17 Ms. Shevitz.

18 MS. SHEVITZ: I do need assistance to get this process
19 done. As I said in one of the letters, getting documents from
20 the bank, from anybody has been next to impossible. I talked
21 about, let's say, it took me a subpoena and then more subpoenas
22 to get the bank records for the Amerindo Panama accounts which
23 he is talking about which I gave to him and that's how he has
24 them now.

25 But this is a constant, huge fight just to get these

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1 documents. The SEC could call them up in an instance and say,
2 give them to me, because that's what happened. They could call
3 and get the numbers. But when I issued a subpoena, I got a
4 call from a paralegal there saying, who is the name on this
5 account. We don't even have anybody by that name.

6 THE COURT: What I think we ought to do is have Mr.
7 Friedman -- he promised me he is going to think about what
8 authority and what specific things are going to be requested
9 and who is going to pay and who is going to ask and if there
10 are certain things that court orders work for or if we want the
11 SEC to ask for certain things and they are willing to or
12 somebody wants me to order the SEC to make certain requests, I
13 am willing to consider that. But I think right now I still
14 have just the vaguest idea of what you are even talking about.
15 So Mr. Friedman is going to put skin on these bones and get
16 back to me.

17 MR. FRIEDMAN: I will try my best.

18 THE COURT: Well, don't fail Friedman, we are counting
19 on you to do this.

20 MS. SHEVITZ: We have been in total agreement with Mr.
21 Friedman for all the way along here.

22 THE COURT: Well, I would watch my wallet then, Mr.
23 Friedman -- I am joking, Ms. Shevitz. I am joking.

24 MS. SHEVITZ: May I have the transcript, please?

25 MR. FRIEDMAN: I was just going to say that it is

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1 great that everybody agrees with me, but no money has been
2 distributed yet.

3 THE COURT: But you have not given us all of the
4 details, so I have no doubt once you start putting some details
5 down, everybody is going to find something to disagree with.

6 Mr. Begos.

7 MR. BEGOS: If I could just point out a couple of
8 things, your Honor, that maybe would inform Mr. Friedman's
9 letter or your Honor's thinking on this.

10 The Mayers are totally in support of anything that
11 would value the assets that JP Morgan is holding or make sure
12 that they are not dissipated, but there would be an issue with
13 respect to any order from this Court that might interfere with
14 efforts by -- the Mayers have state court judgments against the
15 defendants here, and so we would think that your Honor would
16 not want to issue an order against JP Morgan or anyone else
17 that might be interpreted as preventing the Mayers from
18 enforcing their rights to those assets, whatever they may be,
19 under the auspices of their state court judgments.

20 THE COURT: You will get a look at whatever is being
21 proposed. I am not really sure what I am being asked to do, if
22 anything. It is just asking for information and asking
23 claimants to make specific claims. And the basis for those
24 claims, that is easy enough. I assume you would have no
25 objection to that.

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1 MR. BEGOS: No objection.

2 Again, with respect to the claims, we would want to
3 make sure that whatever got decided under this procedure didn't
4 prejudice whatever claims have been established by investors
5 elsewhere. So if Magistrate Judge Fox or your Honor decided
6 that the Mayers were entitled to X dollars here, that wouldn't
7 affect the fact that they were entitled to more by another
8 court.

9 THE COURT: We are a long way from that.

10 MR. BEGOS: I understand. Those are just concerns
11 that I wanted to voice now.

12 THE COURT: I think that is fine, and you will have an
13 opportunity to weigh in.

14 MR. FRIEDMAN: Could I just ask one question?

15 THE COURT: Sure.

16 MR. FRIEDMAN: I am a little unclear about this
17 because I have seen somewhat contradictory statements going
18 back and forth between the SEC and Ms. Shevitz.

19 Are the funds currently at JP Morgan Chase subject to
20 a restraint of any kind other than what Ms. Shevitz has
21 described, I think, as an informal one?

22 MS. SHEVITZ: Yes.

23 THE COURT: That appears a debated issue.

24 MS. SHEVITZ: Yes. There are all sorts of levels of
25 restraints.

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1 MR. JACOBSON: Your Honor, one last response.

2 Ms. Shevitz has made accusation after accusation about
3 the SEC controlling the funds and doing all kinds of things
4 with the funds. The funds in those accounts are not subject to
5 this particular action.

6 THE COURT: I think that is true. I don't think there
7 is nothing to suggest that the SEC has control over these
8 assets. Now, I think the SEC might be able to get information
9 by requesting it in a way that would be easier than Ms. Shevitz
10 asking or Mr. Burger asking.

11 MR. JACOBSON: They don't just give us documents. We
12 actually serve our subpoenas. We informed Ms. Shevitz of a
13 subpoena we issued a while back and invited her to come look at
14 the documents. In the meantime, she has issued subpoenas and
15 got documents. As far as I know --

16 THE COURT: I don't want to get mired into the details
17 of this now. I want Mr. Friedman to think about what he is
18 asking a court to do.

19 MR. FRIEDMAN: Toward that end, can I just ask one
20 question, with your Honor's permission, directly to counsel in
21 the room?

22 Wouldn't everybody agree that the first step is that
23 the funds, all assets of Amerindo should be restrained?

24 I should be asking the Court to issue an order
25 restraining those assets pending further development?

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1 MS. SHEVITZ: Believe me, they are restrained.

2 THE COURT: I believe that they are effectively
3 restrained. I don't think it is by the SEC. I think that the
4 U.S. Attorney's office was dealing with those folks. They are
5 not here, so I don't want to speak for them. I am not sure
6 that I could do it even close to accurately. But I think that
7 is a hurdle that would have to be overcome as to who exactly we
8 are ordering to do what or who I am ordering or who Judge Fox
9 is ordering to do what.

10 But I think what you ought to be focused on is, what
11 you want a court to do? What is the authority for that, and
12 who is going to pay for the costs that are going to be incurred
13 as a result of it?

14 I think if everybody agrees that the costs, even
15 though minor, should be borne by the res, if that's what we are
16 talking about --

17 MS. SHEVITZ: By who?

18 THE COURT: The property itself, the accounts, the
19 res.

20 MS. SHEVITZ: There has been a big chunk taken out
21 already by mismanagement.

22 THE COURT: These are the concerns that have to be
23 addressed.

24 Sir, did you wish to be heard?

25 MR. HESTRES: Yes, your Honor.

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1 If it please the Court, may I be briefly heard?

2 THE COURT: What is your name?

3 MR. HESTRES: My name is Eugene Hestres Velez.

4 THE COURT: Could you spell your name for the record.

5 MR. HESTRES: H-E-S-T-R-E-S V-E-L-E-z.

6 And I was extended courtesy by your Honor to attend
7 today's hearing on behalf of Mr. Heitkonig who is present here
8 and his family. He is one of the claimants in the civil case.

9 We have been hearing and we would just like to set
10 forth the position of our client at this point. I think that
11 the solution that has been proposed by the Court is a perfectly
12 good one.

13 And we would like to request the Court for
14 authorization, also. First, to join in and working together
15 with Mr. Friedman, hopefully, in submitting a joint proposed
16 solution to your Honor. But should the situation arise that
17 there is some discrepancy, may we also be allowed to submit a
18 separate proposal to your Honor?

19 THE COURT: Sure.

20 MR. HESTRES: I think that the first order of business
21 that your Honor stated, there would be the authority. I don't
22 think that it has to go all the way -- I think that your Honor
23 has the authority to issue the order to the accountholders, in
24 this case the institutions for them to restrain.

25 If they restrain as Ms. Shevitz is indicating, it is

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1 an informal one, it is not a formal order from anyone, the
2 institutions saw that the assets as Mr. Friedman has
3 indicated --

4 THE COURT: Don't just tell me what you think my
5 authority is. I want to know where that authority derives
6 from, statutes or case law. That's what I want to know.

7 MR. HESTRES: Absolutely, your Honor.

8 THE COURT: I am fine with trying to work out a
9 practical and a speedy resolution of this, but that is going to
10 require, I think, some heavy thought on your part.

11 MR. HESTRES: Would there be a turnaround to submit
12 this proposal?

13 THE COURT: If you want, I can give you a date but if
14 you don't do it, I am not going to hold you in contempt.

15 Two weeks, is that enough time? Anytime. I don't
16 care when you do it.

17 MS. SHEVITZ: Why don't we have the investors do it
18 when Mr. Friedman does it?

19 THE COURT: I think they are asking should I tell Mr.
20 Friedman and the other investors to submit something by a date
21 certain. I don't think it necessarily matters.

22 MR. FRIEDMAN: Your Honor, we certainly have the
23 motive -- and Mr. Marcus who is here will confirm that -- to do
24 it as quickly as possible, but I don't see any reason for a
25 deadline because, believe me, I don't need a deadline to take

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1 this action.

2 MR. HESTRES: I was not trying to indicate that there
3 was a deadline, but after which the Court says that this matter
4 disappear.

5 THE COURT: No deadline. If you submit something I
6 will respond to it.

7 But you folks do have deadlines, so I will issue an
8 order that just memorializes what we have already talked about
9 in terms of the amended complaint and the letter setting forth
10 a proposed briefing schedule.

11 Anything else that we should be covering today?

12 MR. HESTRES: Thank you, your Honor, for allowing us
13 the courtesy.

14 THE COURT: Anything else from the parties?

15 The SEC?

16 MR. JACOBSON: No, your Honor.

17 THE COURT: Defendants?

18 MS. SHEVITZ: No.

19 THE COURT: What are we doing with the other entities?
20 Is the SEC moving for a default? Is there something that is
21 going to go on with that?

22 MR. JACOBSON: At this point it is not clear. I am
23 not sure that we are able to issue a default under your Honor's
24 individual rules. It requires serving somebody with some type
25 of notice of a default. I don't think anyone is left --

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1 THE COURT: At least some of them have appeared
2 previously, right?

3 MS. SHEVITZ: I am going to object to your Honor
4 telling the SEC which motions to make. I object strongly to
5 this.

6 THE COURT: You objected, but don't interrupt me.

7 What I am asking is, I have parties that are in this
8 action that I have not heard from and I want to know what the
9 plaintiffs are planning to do with those parties. If they
10 don't matter, then they should be just dismissed. If they do
11 matter, then they should be served. If they have already been
12 served, then you should move for a default because this is a
13 six-year-old case, even longer. And I don't have to sit here
14 and wait for things to happen out of thin air. OK.

15 MR. JACOBSON: We agree. The case was stayed for many
16 years.

17 THE COURT: I know that, but I am trying to figure
18 out, I have a docket sheet that is blank with respect to a
19 majority of the defendants.

20 MS. SHEVITZ: One problem is that there is nobody to
21 take any action to represent them. There is hardly any
22 entities. And it would be extremely unfair to have a judgment
23 against them that may be resurrected after this whole mess is
24 over, but there is no money to hire lawyers for anything.

25 THE COURT: That may be. That may not be. They are

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1 corporations. If they have been properly served, then they
2 have to be like any other defendant.

3 MS. SHEVITZ: Except that there are unusual
4 circumstances here which we brought up in the papers, and they
5 may be served but, A) I don't know how you serve somebody who
6 is in jail who purports to possibly be a member of that
7 corporation, and then what are they going to do without any
8 money?

9 Mr. Tanaka in this action in 2010 asked for assignment
10 of counsel and Judge Swain issued an order deeming him pro se.

11 THE COURT: I understand that, but corporations are
12 defendants in cases all the time.

13 MS. SHEVITZ: Yes.

14 THE COURT: And they are responsible to defend
15 themselves in actions and if they don't, then there is a
16 procedure for that. It is called a default.

17 I am not telling the plaintiffs what to do. I am
18 asking what they are contemplating because there is a big gap
19 right now. We have motions contemplated with the two
20 individual defendants, but there are a lot of other defendants
21 here and if I have resolved the individual defendants and then,
22 lo and behold, corporate defendants start asserting defenses,
23 making motions, I guess I want to stay that or stem that from
24 happening now.

25 This thing is no longer stayed This thing is live,

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1 so let's get it going.

2 MR. JACOBSON: Yes, your Honor.

3 We may need some clarification on your Honor's
4 individual rules of practice with respect to serving entities
5 for default under the situation. We have thought a lot about a
6 default.

7 THE COURT: I am not sure what you are referring to,
8 but if you need clarification then you can make that request.

9 Anything else we need today?

10 One thing I did want to say. Premotion letters are
11 not brief but I do expect that the authority cited in them is
12 going to be accurate and not reversed and not superseded by
13 controlling Second Circuit authority.

14 Ms. Shevitz, there were a couple of references to
15 authority in your letter that are just not correct.

16 MS. SHEVITZ: I think we were responding to your
17 Honor's suggestion in one of the orders about collateral
18 estoppel and we pointed out that that case was --

19 THE COURT: You pointed out Gelb which doesn't stand
20 for the proposition you cited it for and in fact there is
21 controlling Second Circuit authority that stands for exactly
22 the opposite proposition of what you were citing Gelb for.

23 You also cited Gabelli, which was reversed by the
24 Second Circuit. So you can't be doing that. No harm done and
25 I am not sanctioning anybody, but I am just saying that should

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1 not be happening.

2 So I will hear from you in a month's time, I guess,
3 and then we will get this puppy going.

4 And, Mr. Friedman, I am going to say a prayer for you
5 every night.

6 MR. FRIEDMAN: Judge, I will need it.

7 THE COURT: Let me thank the court reporter.

8 If anyone needs a copy of the transcript, you can take
9 it up now with the court reporter or later through the web
10 site.

11 Thanks.

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